United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1169

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

Appellee, :

- v - : Docket No. 77-1169

DORIS ELAINE MILLER, :

Appellant. :

B
P/S

BRIEF FOR APPELLANT DORIS ELAINE MILLER

Appeal from A Judgment Of
Conviction In The United
States District Court For
The Eastern District Of
New York

Dominick L. DiCarlo Esq.
66 Court Street
Brooklyn, New York 11201
Attorney for Appellant
Doris Elaine Miller

Dominick L. DiCarlo
Donald E. Nawi
Of Counsel

UNITED STATES COURT OF APPEALS
FILED
AUG 8 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

TABLE OF AUTHORITIES

Cases

Evalt v. United States, 359 F.2d 534, (10th Cir. 1966) 10

Glass v. United states, 351 F.2d 678, (10th Cir. 1965)..... 7

Heflin v. United States, 358 U.S. 415, (1959) 7

Jenkins v. United States, 351 F.2d 678, (10th Cir. 1965) 7

Milanovich v. United States,365 U.S. 551 (1961) 7

United States v. Barfield, 447 F2d 85, (5th Cir. 1971) 8

United States v. D'Anna, 450 F.2d 1201, (2d Cir. 1971) 10,11

United States v. Deutsch, 451 F.2d 78, (2d Cir. 1971) 8

United States v. Geany, 417 F.2d 1116, (2d Cir. 1969) 7

United States v. Grunberger, 431 F. 2d 1062, (2d Cir. 1970) 11

United States v. Nazzaro, 472 F.2d 302, (2d Cir. 1973)..... 11

United States v. Wiley, 534 F.2d 659, (6th Cir. 1976)..... 10

Other

18 U.S.C. 2113 (c) 1

F.R. Crim. P. 52 (b) 7

F.R. Evid. 801 (d)(2)(E) 7

ABA, Standards 11

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	2
STATEMENT OF FACTS	3
ARGUMENT	6
POINT I	
THE EVIDENCE WAS INSUFFICIENT TO CONVICT MILLER OF RECEIVING THE ROBBERY PROCEEDS	6
POINT II	
THE PROSECUTOR'S SUMMATION AND THE COURT'S EXCESSIVE INTERVENTION DEPRIVED MILLER OF A FAIR TRIAL	8
CONCLUSION	13

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, :

Appellee, :

- v - : Docket No. 77-1169

DORIS ELAINE MILLER, :

Appellant. :

BRIEF FOR APPELLANT DORIS MILLER

Doris Miller appeals from her conviction on December 10, 1976 in the United States District Court for the Eastern District of New York (Bartels, J.) upon a jury verdict of one count of knowingly receiving proceeds from a bank robbery. 18 U.S.C. 2113 (c). After a three month commitment for observation and report, which with confinement pending trial made almost six months in prison, the court sentenced her on March 25, 1977 to three years probation under the Youth Corrections Act. Counsel on this appeal is assigned under the C.J.A.

Eugene Welcome, a co-defendant, was convicted at the same trial of committing the robbery in question. His sentence was twenty years. His appeal is being prosecuted jointly with this one.

QUESTIONS PRESENTED

1. Whether the Government's evidence was sufficient to show that Miller violated the statute against receiving the proceeds of a bank robbery in light of the fact that (a) the only evidence that she actually received such proceeds was hearsay which the jury could not consider; and (b) since no principal violated the receiving statute, she could not be held in as an aider and abettor.

2. Whether Miller was deprived of a fair trial by the prosecutor's improper reference on summation to the cooperating witnesses' agreements with the Government and by the trial judge's excessive intervention in the questioning, reflecting his belief in the truth of the Government's testimony.

STATEMENT OF FACTS

On November 10, 1975 three men robbed a Chemical Bank Branch at Nostrand Avenue Brooklyn of some $36,000. A woman drove the getaway car..

By the trial in October 1976, one of the three, Willy Leach, was dead, killed in a shootout in another bank robbery a month later. A second, DeWitt Owens, a vicious twenty-one year old (193, 367, 521)*, an addict with a long record (76, 436-39), had made an advantageous bargain with the Government and was one of its principal witnesses. The woman was Owens' girl-friend Vanessa Hodges. She also was an addict (76), also with a long criminal record (179-80, 192), had made an equally fine bargain and was the other principal witness.** Together, Hodges and Owens pinpointed Welcome as the third man and Miller as a behind the scenes accessory, helping in little ways, who later shared in the proceeds to the extent of $1,000. The jury convicted her on the last aspect.

---

* Numbered references, without more, are to the trial transcript. "A" denotes the Joint Appendix to the Brief for Appellants.

** Hodges had robbed three banks (29), committed armed robbery and violated probation (33). In return for her cooperation the Government agreed to a plea to one bank robbery with a five year maximum sentence (30) and dismissed the charges on the other two (32).

The Robbery

Welcome ran a sandwich and grocery store on Nostrand Avenue in Brooklyn (47). Hodges, Miller and Gloria Adams, Welcome's common-law wife, all worked there and so from time to time did Willy Leach and Hodges' boyfriend Owens (48-49).

In October 1975 Welcome, a sort of paterfamilias to the rest, told Hodges and Leach that he was going to rob a bank (52). Owens was later brought into it as well (62). Hodges went in the Bank first to report on the location of the guard and drove the getaway car (it was stolen, 90) after the others came out (92). A bag with substantial sums was left behind (93, 477-80). Welcome then gathered the "family" at the store and distributed $1,000 to various participants (102-03).

Miller's Alleged Role

The case against Miller consisted of the following:

First, she was present on one and possibly two occasions before the robbery when it was discussed (68). There is no suggestion that on these occasions she was either requested to participate or assented to become involved in any way. The testimony was solely that she was present when the others planned the venture.

Second, her apartment was used as a staging point and rendezvous after the crime. The weapons used in the robbery were kept there also (68). But Miller and Leach were then living together and it was his participation, not hers, which brought

in the apartment. Leach had been instrumental in the robbery and the weapons which were stored there were his.

Third, Hodges claimed Miller contributed a pair of stockings for the others to use as masks (87). And according to Owens she gave them a bag to use to carry the money (475) and later helped cut open one of the money bags from the bank (481).

Fourth , although neither Hodges nor Owens had any direct knowledge of Miller's having received proceeds from the robbery, Hodges testified that Welcome said he gave Miller $1,000 (103).

Indictment and Trial

The indictment on which Miller and Welcome were tried was returned in July 1976(A 6). The trial in October was for the robbery itself and with a dangerous weapon (Counts Two and Three) with Miller charged as an aider and abettor (A 7-8), and against Miller alone on Count Four for knowingly receiving the robbery proceeds (A 8).

The Government's case featured Hodges and Owens. Hodges told as well as a similar act about another Chemical Bank robbery (corroborated by a bank employee, 983, 990), this time for $54,000,which she and Welcome executed in March 1976 (29, 154, 159). Hodges claimed that Miller received $1,000 from this as well (162).

Welcome and Miller both testified and denied part-

icipation in the bank robbery or the fruits thereof. According to Welcome he was running between the stores thoughout the day (794, 796) and had been involved by Hodges and Owens because of a falling out he had with them (777). Miller denied giving help to the robbers (893), and said she neither received $1,000 nor agreed to receive it for participation in a bank robbery (896-97).

The jury convicted Welcome on the two robbery counts, Two and Three. It acquitted Miller on those counts but convicted her of knowingly receiving robbery proceeds (Count Four).

ARGUMENT

We urge three grounds for reversal. The first (Point I) requires a direction for dismissal of indictment. The last two (Point II), separately but certainly if taken together, require a new trial.

POINT I

THE EVIDENCE WAS INSUFFICIENT TO CONVICT MILLER OF RECEIVING THE ROBBERY PROCEEDS.

The Government plainly failed in its proof on Count Four. An essential element of the crime was that Miller have "received, possess and concealed" (A 8) the robbery proceeds. The Government had no proof that that had happened. Hodges, in response to the Court's question, told of Welcome's statement that he had given $1,000 to Miller (A 68). But this statement

was inadmissible hearsay, which could not come in either as a co-conspirator declaration, F.R. Evid. 801 (d)(2)(E), United States v. Geany, 417 F.2d 1116 (2d Cir. 1969), the jury's adverse verdict on Counts two and three having established that Miller never became a conspirator.

Permitting the jury to find Miller's receipt of $1,000 based on the Welcome hearsay statement would, even without objection, be plain error requiring reversal. F.R. Crim. P. 52(b). However Miller had a continuing objection to any statements of Welcome outside of her presence (50), and this was one of them.

Owens, it is true, said he saw Miller bring a knife to cut one of the bank bags. That would not be enough to find that Miller violated Sec. 2113(c) as a principal since the robbery proceeds must have come into her hands and that was not proven. Heflin v. United States, 358 U.S. 415, 419(1959) ("subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber."). As to aiding or abetting Welcome, Leach, Hodges or Owens in violating that section, one can be guilty of the actual robbery (Sections (a), (b) or (d)) or the knowing receipt of proceeds (section (c)), but not both. Heflin v. United States, supra; Milanovich v. United States, 365 U.S. 551 (1961); Jenkins v. United States, 361 F.2d 615 (10th Cir. 1966); Glass v. United States, 351 F.2d 678, 680 (10th Cir. 1965). Welcome, Leach, Hodges and Owens, who actually robbed the bank, did not violate section (c). Without a violation

by a principal, there could be no aiding or abetting by Miller. United States v. Deutsch, 451 F.2d 78, 118 (2d Cir. 1971); United States v. Barfield, 447 F.2d 85,89 (5th Cir. 1971).

POINT II

THE PROSECUTOR'S SUMMATION AND THE COURT'S EXCESSIVE INTERVENTION DEPRIVED MILLER OF A FAIR TRIAL.

The crucial trial issue was the credibility of Hodges and Owens. Two actions, one by the prosecutor and one by the trial judge in his extensive participation in their examination, unfairly and improperly tipped that issue in the Government's favor.

The first has reference to the manner in which the prosecutor on summation, handled the issue of Hodges and Owens' motive to lie. Initially he conceded that both were in serious trouble and were cooperating "to save their skins" (1060). We have no problem with that. He went on, however, to refer to their agreement with the Government, which had earlier been made known to the jury, in which the Government reserved its rights in the event that Hodges or Owens (as the case might be) committed perjury. That agreement, he stated,

"is predicated on truth. On their testifying absolutely truthfully. If they testify falsely with respect to any material fact, what happens to their deal with the Government? It's thrown out the window. All bets are off. We're not going to go to bat for them at the time of sentencing before Judge Bartels" (1060-61).

He continued:

> " Look, ladies and gentlemen, DeWitt Owens and Vanessa Hodges know that when they take the stand, after their direct examination, they're going to be subject to cross-examination by two defense counsel, Mr. DiCarlo and Mr. Sunden. They know that the purpose of cross-examination is to prove that they are liars.
>
> Now, what should happen if they should implicate two innocent people in a crime they didn't commit? What happens after Mr. DiCarlo and Mr. Sunden, on their cross-examination prove that they are liars, prove that they are implicating innocent people? What happens to their deal with the government?
>
> Do they really expect us to go to bat at the time of sentencing before Judge Bartels when they're proven to be liars by Mr. DiCarlo and Mr. Sunden? They plead guilty. Both of those witnesses before Judge Bartels. They're going to be sentenced by Judge Bartels. How do you think Judge Bartels is going to feel about those witnesses when Mr. DiCarlo and Mr. Sunden prove that they're liars?
>
> They want to make absolutely certain that they tell the truth 100 per cent, right up and down the line, because they don't want to ruin their agreement with the government. They're happy with their agreement." (1061-62).

The erroneous implications are at least three. First, the Assistant was warning the jury that a verdict adverse to the Government would mean that Hodges and Owens were liars, that would void their agreement with the Government, and that in turn would result in substantial jail sentences from Judge Bartels. It was thus impressed upon the jury that it was deciding not only the case of Welcome and Miller -- the defendants before it -- but the sentencing fate of Hodges and Owens as well.

District judges state again and again to jurors that possible sentences to the defendants on trial are to play no role in their verdict. The district court so stated here (A 61-62). The Assistant, however, was arguing to the jury the outcome on sentencing of Hodges and Owens. He should not have been permitted to do so.* United States v. Wiley, 534 F.2d 659 (6th Cir 1976) (prosecutor may not refer to facts outside the record in explaining cooperating witness' bargain with Government and may not refer to "impending doom of the federal witness protection plan" if defendant acquitted); Evalt v. United States, 359 F.2d 534 (10th Cir 1966) (prosecutor may not refer to penalty); United States v. D'Anna, 450 F.2d 1201, 1206 (2d Cir. 1971) (improper to refer to additional income tax burdens for jurors if defendant's proper tax not paid).

Second, the Assistant misstated the facts. It was quite possible that the jury could acquit Welcome and / or Miller and the Government still "go to bat" for Hodges and Owens. Because the jury thought they were liars, in whole or in part, would not mean the Government thought they were also.** Or, for

---

* Objection to this line in the Assistant's summation was made and overruled (1061).

** The recent Bronfman trial in Westchester furnishes a good example of that. The jury thought Samuel Bronfman was a liar when he denied engineering the abduction and acquitted defendants Lynch and Byrnes of kidnapping him. The District Attorney promptly stated that he thought Bronfman was telling the truth and would not prosecute him for participation in an attempt to extort ransom money from his father or for perjury.

that matter, did it mean Judge Bartels would think so. And the Government might still "go to bat" for them if it wanted their cooperation in any other respect.

Finally, the argument amounted to an improper vouching of the witness' credibility. ABA, Standards Relating to the Prosecution Function, Sec. 5.18.

With respect to the actions of the district court, we recognize that the court is normally permitted a fair latitude in taking over the questioning of the witnesses. There comes a point, however, particularly where the credibility issue is close, where the court's actions are excessive, United States v. D'Anna, supra, and by that convey to the jury that the Government's witnesses are to be credited. United States v. Grunberger, 431 F. 2d 1062, 1067-68 (2d Cir. 1970); United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973).

This is such a case. There is scarcely a page during the direct examination of Hodges and Owens where the district court did not participate in the questioning. At times, A 65-68 is only one small example, he took it over entirely. Indeed practically all of the basic questioning of Owens came from the court. e.g. 462-65. Rather than weigh this Court with an Appendix that culls the record for the quantity of the intervention we set forth a list of record references where it occurred, starring a few of the places where it was particularly inappropriate:

49	52	53	54
55*	56*	57	60
60	71	75-76*	78
88-89*	94-96a*	97-98	99*
100-103	201-202	231	355-57
367	387-89	402-03	405
421-25	434-35	439	462-65*
469-71	481-83	493,496,497	508,509,510,511,512-13
562-64	612		

The jury could not but take from this repeated intervention to clarify and organize the stories of Hodges and Owens, that the district judge was satisfied with the witness' credibility. It was almost as if the district judge made the witnesses his own; and one does not present witnesses whose credibility he doubts. If there was any question about that, the district judge dispelled it when Welcome's counsel, on Owens' cross-examination, suggested Owens might not be telling the truth about a heroin purchase, and the court said (568):

> "He is telling the truth. He wants to protect himself of participation of other crimes: that's not a violation of that agreement."

No amount of statements either then (568) or later could dispel the improper effect of this exchange, coupled with the court's excessive intervention.

CONCLUSION

This Court should reverse the judgment below and direct dismissal of the indictment against Miller. Barring that for the reasons set forth in Point II it should direct a new trial. We rely in addition on any points raised by co-appellant to the extent applicable.

Respectfully Submitted

Dominick L. DiCarlo, Esq.
Attorney for Appellant
Doris Elaine Miller

Dominick L. DiCarlo
Donald E. Nawi
Of Counsel

UNITED STATES V. WELCOME AND MILLER

CERTIFICATE OF SERVICE

I certify that on June 6, 1977 I had mailed a copy of the Joint Appendix to Briefs for Appellants and the Brief for Doris Elaine Miller to David Trager, United States Attorney for the Eastern District, 225 Cadman Plaza East, Brooklyn N.Y. 11201.

Donald E. Nawi

Donald E. Nawi